knew the deceased was in a precarious and dangerous position at the material time. All he need do to avoid the collision was to swerve slightly to his left but instead he elected to proceed on 1 or 2 feet from the centre white line as if to teach the deceased a lesson for overtaking at the wrong place and time.

I am therefore of the view that the apportionment of liability for contributory negligence is fair and equitable in the circumstances.

Order accordingly.

Solicitors: *Chew & Co.; Sng & Matthew*

PUBLIC PROSECUTOR v. PUTEH NORDIN & ANOR.

[O. Cr. J. (Ajaib Singh J.) March 22, 1983]
[Ipoh – Perak Criminal Trial No. 2 of 1983]

Dangerous Drugs – Trafficking – "Cannabis" – Definition of Cannabis as dangerous drug – "any plant of the genus cannabis or any part thereof ... together with its stalk, its fibre and seed" – Chemist was right in weighing cannabis plants with stalk, fibre and seed – Dangerous Drugs 1952, s. 39B(1)(a).

Criminal Law & Procedure – Trafficking in cannabis – Accused persons jointly charged – 1st accused convicted and sentenced but 2nd accused acquitted and discharged.

In this case, 2 accused were jointly charged with trafficking in a dangerous drug under s. 39B(1)(a) of the Dangerous Drugs Act 1952. At the end of the prosecution case the trial court acquitted and discharged the 2nd accused as there was insufficient evidence to call for his defence. The first accused was called upon to make his defence.

The chemist examined the contents of the bundle and found it to contain 2.87 kg. cannabis. Defence counsel submitted that the weight of the cannabis must be less than 2.87 kg. because the chemist had weighed the contents of the bundle before separating the stalk, fibre and seed.

Held: (1) any plant of the genus cannabis or any part thereof comes within the definition of cannabis as a dangerous drug together with its stalk, its fibre and seed. The chemist was therefore right in weighing the plants she found in the bundle without removing the stalk, fibre and seed;

(2) the 1st accused made no attempt to rebut the presumption against him under s. 37 (da) of the Dangerous Drugs Act and he was therefore found guilty and convicted on the charge;

(3) the Court took into consideration the following mitigating factors: the accused was a first offender, had a wife and 5 children to support and that the drug found in his possession was less deleterious than morphine and heroin. He was therefore not sentenced to death but to the lesser punishment of life imprisonment plus 6 strokes of the rotan.

Editorial Note: The first accused's appeal against conviction and the Public Prosecutor's cross-appeal against sentence of life imprisonment came up for disposal before the Federal Court in Kuala Lumpur on August 15, 1983 (Federal Court Civil Appeal Nos. 13 & 15 of 1983). Both the appeal and the cross-appeal were dismissed. The Federal Court which was in complete agreement with Ajaib Singh J.'s interpretation of the new definition of "Cannabis" under section 2 of the Dangerous Drugs Act 1952 (as amended by Act A491 which came into force on May 30, 1980) gave no written judgment.

CRIMINAL TRIAL.

Tee Hong Geok (Miss) (Deputy Public Prosecutor) for the prosecution.

Bakarudin bin Sulaiman for the 1st accused.

S. Theivanthiran and *J.S. Olikh* for the 2nd accused.

Cur. Adv. Vult.

Ajaib Singh J.: The two accused in this case were jointly charged with trafficking in a dangerous drug under section 39B(1)(a) of the Dangerous Drugs Act 1952. At the end of the prosecution case I acquitted and discharged the 2nd accused as I held that there was insufficient evidence to call for his defence. The 1st accused was called upon to make his defence and after the conclusion of the trial I found him guilty and sentenced him to life imprisonment plus six strokes of the rotan.

The evidence against the 1st accused was overwhelming for he was caught red-handed. The police had set up a trap and DPC Sivanesan met the 1st accused at a pre-arranged place on the roadside to buy ganja from the 1st accused. A short while later they were joined by the 2nd accused who turned up at the place on a motor cycle which had a large basket on its carrier. The 1st accused then walked over to a hut nearby and came back wheeling a bicycle and on the carrier of the bicycle was a bundle covered with a gunny sack. The 1st accused removed the bundle and placed it in the basket which was on the motor cycle. At the request of DPC Sivanesan the 2nd accused opened the bundle and DPC Sivanesan found it to contain ganja. DPC Sivanesan then gave a pre-arranged signal whereupon a police party which was keeping observation rushed up and arrested both the accused. The bundle was sent to the chemist who certified that it contained 2.87 kilograms of cannabis.

The evidence against the 2nd accused was not strong enough for his defence to be called. He had joined the 1st accused and DPC Sivanesan just before the 1st accused left the place to bring the ganja. And at the request of DPC Sivanesan the 2nd accused opened the bundle to enable DPC Sivanesan to look at its contents. The bundle was placed in the basket by the 1st accused and there was no evidence that the 2nd accused knew that the bundle contained ganja. In my view the evidence against the 2nd accused was not strong enough for a *prima facie* case to be established against him. There was insufficient evidence to implicate him in this case as to his knowledge of the contents at least until such time as the bundle was opened and as to his being in joint possession of the bundle which was subsequently found to contain ganja.

In cross-examination DPC Sivanesan said "Man (2nd accused) told me I could contact him if I wanted drugs". I held this statement to be inadmissible under section 37A of the Dangerous Drugs Act as it was made to an officer below the rank of an Inspector. But even if this statement had been made to a police officer of or above the rank of Inspector I still would have thought that this statement was insufficient to establish that the 2nd accused knew that the bundle contained ganja and to establish joint possession of the ganja as stated in the charge. I accordingly acquitted and discharged the 2nd accused without calling for his defence.

The 1st accused chose to remain silent but called the chemist to give evidence in support. The chemist said that she examined the contents of the bundle and found it to contain 2.87 kilograms of cannabis. She ascertained the weight of the cannabis by weighing the bundle and then deducting from this total weight the weight of the paper of the bundle and the strings with which it was tied. She said she weighed the cannabis plants without separating the stalk, fibre and seed as this was the proper procedure for ascertaining the true weight of the cannabis.

Learned counsel for the 1st accused submitted that the weight of the ganja must be less than 2.87 kilograms because the chemist had weighed the contents of the bundle before separating the stalk, fibre and seed. The definition of cannabis in the Dangerous Drugs Act excludes the stalk the fibre and the seed and as such the chemist should have removed all these from the plant before weighing. This was not done and therefore the chemist had not ascertained the true weight of the cannabis.

I found no merit in this submission. Under the Dangerous Drugs Act "cannabis (except in the expression cannabis resin) means any plant of the genus cannabis or any part of any such plant (by whatever name designated) but does not include cannabis resin or any of the following products after separation from the rest of the plant, namely –

(a) mature stalk of any such plant;

(b) fibre produced from mature stalk of any such plant; and

(c) seed of any such plant;

This definition consists of two parts. The first part states that any plant of the genus cannabis or any part thereof is cannabis. This is a dangerous drug and trafficking in it is an offence under the Act. The second part in the definition of cannabis states that cannabis does not include cannabis resin and does not include certain products after these products have been separated from the cannabis plant namely mature stalk of the plant, fibre produced from the mature stalk of the plant and seed of the plant.

It will be seen therefore that any plant of the genus cannabis or any part thereof comes within the definition of cannabis as a dangerous drug together with its stalk its fibre and seed. All these constitute the plant. It is only when mature stalk and seed are separated that is to say removed from the cannabis plant that these products by themselves are excluded from the definition of cannabis as a dangerous drug. Also excluded is fibre produced from mature stalk of the plant. The chemist was therefore right in weighing the plants she found in the bundle without removing the stalk, fibre and seed.

Under section 37(da) of the Dangerous Drugs Act a presumption arose against the accused that he was trafficking in cannabis because he was found in possession of more than 200 grams of the drug. The accused made no attempt to rebut the presumption and he was therefore found guilty and convicted on the charge. On sentence I took into consideration some mitigating factors in favour of the accused and did not sentence him to death but to the lesser punishment of life imprisonment plus six strokes of the rotan. The mitigating

factors were that the accused was a first offender, had a wife and five children to support and that the drug found in his possession was less deleterious than morphine and heroin.

Order accordingly.

Solicitors: *Lee, Loo & Bakarudin; Maxwell, Kenion, Cowdy & Jones.*

RE RASIAH MUNUSAMY

[R.G.J. (Edgar Joseph Jr.) April 20, 1983]
[Penang – Criminal Revision No. 9 for 1983]

Criminal Law and Procedure – Criminal revision – Private complaint – Issuance of Warrant of Arrest by Magistrate – Magistrate merely called complainant to attest complaint upon oath – Mandatory procedure not followed – Warrant of arrest made without jurisdiction and therefore void – Criminal Procedure Code, ss. 132, 133(i) & 323(i)

The court in this case exercised its powers of revision pursuant to section 323(i) of the Criminal Procedure Code. The record disclosed that in his complaint made under the provisions of sections 32 and 133(i), the complainant alleged that his wife had been enticed away from him for illicit intercourse and that she was being kept in a hotel in Penang by deceit. The record also disclosed that acting merely on the strength of this complaint which was affirmed to before her, and the first information report, the learned Magistrate directed the issue of a Warrant on the same day.

Held: (1) with the exception of complaints of an offence where a summons is applied for by a police officer or a public servant acting officially, the very first thing the Magistrate must do upon receipt of a complaint under section 133(i) (which includes a complaint under section 132) is at once to examine the complaint upon oath and reduce the substance of the examination into writing which shall be signed by the magistrate and the complainant. It is a sort of a preliminary enquiry but care must be taken not to inquire into the case for the defence;

(2) a person complained against is not a party to the proceedings for he is not yet an accused person so he is in no position to claim a right to be represented. However, he is entitled to attend the proceedings like any member of the public though he has no *locus standi* as a party, and a magistrate may, if he so wishes, examine or question him. Care, however, must be taken not to convert the enquiry into a trial before a trial;

(3) it follows, therefore, that merely to call the complainant to attest the complaint upon oath is not sufficient nor would be sufficient to follow this up with an unrecorded and unsworn interview. The requirements given above are mandatory, their object being to enable the magistrate to decide on the veracity of the complaint for upon that will depend his decision as to whether or not a process should issue;

(4) in this case the record clearly showed that there was not even a semblance of compliance with the said requirements. The order by the learned Magistrate directing the issue of a Warrant of arrest in this case was made without jurisdiction and was therefore void.

Cases referred to:

(1) *Teoh Chong Si* v. *Nunn* 11 S.S.L.R. 80.
(2) *Sheikh Chand* v. *Mohamed Hanif* 8 Cr. L.J. 20.
(3) *Jinilal Mandal* v. *Chanderdeo Prosad* A.I.R. 1941 Pat. 419.
(4) *Manindra Nath* v. *Anil Chandra* A.I.R. 1953 Cal. 689.

Cur. Adv. Vult.

Edgar Joseph Jr. J: I decided to exercise my powers of revision in this case pursuant to the provisions of section 323(i) of the *Criminal Procedure Code* ("the Code") because I was amply satisfied that there had been a clear misuse of legal powers in the issue of a warrant of arrest.

For the sake of brevity and convenience, all references to statutory provisions in this judgment, unless otherwise expressly stated, are to the Code.

A scrutiny of the record disclosed that in his complaint which was made under the provisions of sections 132 and 133(i), affirmed to on 15/4/83, the complainant alleged that his wife had been enticed away from him for illicit intercourse and that she was being kept in a hotel in Penang by deceit. I thought this was a typical example of swearing by the book, but, be that as it may, the first information report which was made by the complainant the night before at Penang was somewhat fuller and its essential parts were as follows:–

"My wife ... was taken away to Penang without my knowledge with intent that she may have illicit intercourse with him. I believe he has concealed and detained her in a hotel in Penang and they are expected to stay in Penang for three days. I seek police help to obtain a warrant and charge him vide section 493 and section 498 of the Penal Code. I believe my wife has already committed adultery with him."

The record also disclosed that acting merely on the strength of this complaint, which was affirmed to before her, and the first information report, the Magistrate without further ado directed the issue of a warrant on the same day.

Now, with the exception of complaints of an offence where a summons is applied for by a police officer or a public servant acting officially, the very first thing the magistrate must do upon receipt of a complaint under section 133(i), and that of course includes a complaint under section 132 which provides specially for offences of entice-